Case Comment

EEOC v. Children's Hospital Medical Center — The Res Judicata Effect of a Class Action Consent Decree on the Title VII Rights of Future Employees Included in the Class

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I. INTRODUCTION

Title VII of the 1964 Civil Rights Act[1] is premised on two fundamental policies: remedying employment discrimination[2] and encouraging settlement of discrimination claims.[3] Generally, these two policies are complementary because by encouraging the parties to voluntarily agree to a settlement, employment discrimination practices are eliminated without the vulgarities of

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-g (1982)). Section 703 of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status an an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982).

2. The legislative history of Title VII provides that the purpose of the Act "is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion or national origin." H.R. REP. No. 914, 88th Cong., 2d Sess. 2, *reprinted in* 1964 U. S. CODE CONG. & AD. NEWS 2391, 2401. *See also* Alexander v. Gardner-Denver, 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

3. Explaining Congressional intent to encourage settlement of Title VII cases, the Ninth Circuit has stated that:

> The legal complusion toward voluntary resolution of disputes was given increased significance in Title VII cases by Congress which made the conciliation process the core of Title VII. Until the 1972 amendments to Title VII, the EEOC could not litigate. Even now, the statute states that the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before resorting to litigation.

Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 n.11 (9th Cir. 1976) (quoting from 42 U.S.C. § 2000e-5(b) (1982)). *See also* EEOC v. Children's Hosp. Medical Center, 719 F.2d 1426, 1435 (9th Cir. 1983) (Schroeder, J., dissenting); Cotton v. Hinton, 559 F.2d 1326, 1330-31 (5th Cir. 1977); 42 U.S.C. § 2000e-5 (1982).

Congress' desire to encourage settlement of Title VII actions is quite evident in the legislative history. For example, facilitation of settlements was a major concern in the debate whether or not to give final authority under the Act to the federal judiciary. Several members of the House stated that giving final authority under the Act to the federal judiciary would result in the "settlement of complaints occur(ring) more rapidly and with greater frequency." H.R.

protracted litigation. Given the remedial and settlement policies of Title VII, class actions are particularly well-suited for adjudication of class-wide discrimination claims.[4] Utilization of class actions makes Title VII a more effective tool for eliminating employment discrimination by providing relief to persons who would otherwise be disinclined or unable to bring a lawsuit. Thus, as a result of the availability of class relief, more people benefit from Title VII. Moreover, class actions often result in settlements,[5] which makes Title VII relief available sooner than if each claim had to be litigated separately.

Civil rights class actions are often certified[6] under subdivision (b)(2) of rule 23 of the Federal Rules of Civil Procedure.[7] Under rule 23, class action judgments are binding on *all* members of the class.[8] Thus, a crucial issue in evaluating the remedial and settle-

REP. NO. 914, 88th Cong., 2d Sess. 2, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2515. Conversely, Representative Kastenmeir expressed his concern that giving final authority to the judiciary would impede the remedial objective of Title VII because it would result in slow and costly court proceedings. *Id.* at 2411. In addition, the preamble to the Senate bill (the House bill was passed in lieu of the Senate bill) states that the purpose of the Civil Rights Act was "to achieve peaceful and voluntary settlement of the persistent problem of racial . . . discrimination . . . ." S. REP. NO. 372, 88th Cong., 2d Sess. 2, *reprinted in* 1964 U.S. CODE CONG & AD. NEWS 2355, 2353.

4. The Advisory Committee note to rule 23 of the Federal Rules of Civil Procedure indicates that subdivision (b)(2) of rule 23 was designed, at least in part, to facilitate the bringing of civil rights class actions. *See* FED. R. CIV. P. 23(b) advisory committee note, 39 F.R.D. 98, 102. Subdivision (b) of rule 23 provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

FED. R. CIV. P. 23(b). *See also* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.40(1) (2d ed. 1985); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1775-76 (1972 & Supp. 1985). *But cf.* General Tel. Co. v. Falcon, 457 U.S. 147, 159 (1982) (In the context of holding that rule 23(a) must be strictly adhered to, the Court stated: "We find nothing in (Title VII) to indicate that Congress intended to authorize such a wholesale expansion of class action litigation."); Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 25 (1983) ("The argument from the Advisory Committee note to rule 23 reads too much into the Advisory Committee's statement that civil rights actions are illustrative of class actions appropriate for certification under subdivision (b)(2).").

5. *See* Wolfram, *The Antibotics Class Actions*, A.B.F. RES. J. 251, 357 (1976), *noted in* J. LANDERS & J. MARTIN, CIVIL PROCEDURE 511 (1981) (as of 1976, only two class actions of major significance had gone to trial since rule 23 was amended in 1966).

6. Certification is provided for in subdivision (c)(1) of rule 23 which provides in part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23 (c)(1).

7. For the pertinent text of subdivision (b)(2), see *supra* note 4. For examples of civil rights class actions certified under subdivision (b)(2), see EEOC v. Detroit Edison Co., 515 F.2d 301, 310 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 256-57 (5th Cir. 1974), *modified* 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971). *See also* 7A C. WRIGHT & A. MILLER, *supra* note 4, § 1775.

8. Subdivision (c)(3) of rule 23 provides: "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include

ment objectives of Title VII is the extent to which a rule 23 class action judgment precludes members of the class from relitigating their Title VII claims in a subsequent action.

The common law doctrine of res judicata[9] consists of two distinct rules of preclusion: claim preclusion and issue preclusion. Under the claim preclusion rule, a final judgment extinguishes all rights of the plaintiff against the defendant arising out of the same transaction or series of connected transactions.[10] Under the issue preclusion rule, if a party has had the opportunity to fully and fairly litigate an issue it will be precluded from relitigating the same issue in another action.[11] In class actions, the judgment is res judicata to all class members, not just the named parties.[12] Thus, by making the judgment binding on unnamed class members, rule 23 not only embodies the doctrine of res judicata but expands the scope of the preclusion beyond the common law.[13] Nevertheless, the class action judgment will not preclude the actions of individual class members who were not adequately represented by the class representatives in the prior action.[14]

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and describe those whom the court finds to be members of the class." FED. R. CIV. P. 23(c)(3). *See also id.* advisory committee note, 39 F.R.D. 69, 105-06.

9. In this Comment, the following terminology has been adopted from the RESTATEMENT (SECOND) OF JUDGMENTS (1982):

> (m)erger—the extinguishment of a claim in a judgment for plaintiff (§ 18); bar—the extinguishment of a claim in a judgment for defendant (§ 19); and issue preclusion—the effect of the determination of an issue in another action between the parties on the same claim (direct estoppel) or a different claim (collateral estoppel) (§ 27).

Id. ch. 3 introductory note. The Restatement uses "res judicata" as encompassing all three of these concepts. *Id.* In addition, the term "claim" is used in this Comment to embrace ". . . all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions). . . ." *Id.* § 24 comment a. The phrase "claim preclusion" conveys the ideas of bar and merger collectively. *See Id.* § 24 introductory note. The Supreme Court has expressed its approval of the Restatement's use of terminology in this area. *See* Migra v. Warren City School Dist., 104 S. Ct. 892, 894 n.1 (1984).

10. *See* RESTATEMENT (SECOND) of JUDGMENTS § 24 (1982). *See also* Migra v. Warren City School Dist., 104 S. Ct. 892, 894 n.1 (1984); RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-26.

11. *See* Migra v. Warren City School Dist., 104 S. Ct. 892, 894 n.1 (1984); Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). *See also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-28.

12. FED. R. CIV. P. 23 (c)(3). Note, however, that the res judicata effect of a judgment can only be determined in a subsequent proceeding. *See* C. WRIGHT & A. MILLER, *supra* note 10, § 1789, at 176.

13. The general rule of res judicata is that a final judgment is not binding on anyone who has not been designated as a party and been served with process. *See* C. WRIGHT & A. MILLER, *supra* note 4, § 1789. *See also* Pennoyer v. Neff, 95 U.S. 714 (1877).

14. *See* Hansberry v. Lee, 311 U.S. 32 (1940). The adequacy of representation requirement is stated in the Federal Rules of Civil Procedure as follows: "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). *See also infra* text accompanying notes 123-67.

In summary, rule 23 operates as a double-edged sword in Title VII actions. On the one hand, the class action device facilitates the adjudication and settlement of class-wide discrimination claims. On the other hand, the class action judgment extinguishes all class rights arising out of the claim adjudicated in the action, and thereby precludes any subsequent action by an absent class member based on the same claim.[15]

II. EEOC v. CHILDREN'S HOSPITAL MEDICAL CENTER

The preclusive effect of the class action judgment is especially harsh when a Title VII class includes future employees because the prior action does not afford these employees the opportunity to voice objections to the named parties' representation of the class. *EEOC v. Children's Hospital Medical Center*[16] is an example of the harsh preclusive effect of the class action judgment on the Title VII rights of future employees included in a rule 23 class. In that case, the Ninth Circuit held[17] that the doctrine of res judicata operated to bar the employment discrimination claims of three employees of the Children's Hospital Medical Center. The court reasoned that the employees were bound by the remedial provisions of a consent decree entered against the Hospital six years earlier in *Clayton v. Children's Hospital Medical Center.*[18]

Clayton was a Title VII class action brought under subdivision (b)(2) of rule 23.[19] The class included all past, present, and future black employees of the Hospital.[20] The district court approved a

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15. It seems clear that res judicata is fully applicable in Title VII class actions. *See* Cooper v. Fed. Reserve Bank of Richmond, 104 S. Ct. 2794 (1984). One authority, however, argues that "[c]ourts have departed from the usual rule that claim preclusion extends to all claims arising out of the same transaction or occurence as the claims that were actually litigated and, instead, have limited claim preclusion to those claims that were actually litigated." The reason for this, he says, is that failure to assert a claim is strong evidence of inadequate representation. Rutherglen, *supra* note 4, at 76-77. The force of Rutherglen's argument is mitigated by the Supreme Court's recent decision in Migra v. Warren City School Dist., 104 S. Ct. 892 (1984). While *Migra* was not a class action, the Court did hold that a state court judgment is res judicata to a 42 U.S.C. § 1983 case in federal court when the § 1983 issue could have been litigated in the state court proceeding. Migra v. Warren City School Dist., 104 S. Ct. 892, 897-98 (1984). *See infra* note 36 for the text of § 1983.

16. 30 Fair Empl. Prac. Cas. (BNA) 961 (9th Cir. 1982), *vacated*, 702 F.2d 1288 (9th Cir.), *rev'd on other grounds*, 719 F.2d 1426 (9th Cir. 1983).

17. A three judge panel of the Ninth Circuit heard EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961 (9th Cir. 1982). The court was divided in its decision. Judges Schroeder and Kelleher composed the majority; Judge Poole dissented.

18. No. 74-2165 (N.D. Cal. Dec. 28, 1976) (order approving consent decree).

19. *See* EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961 (9th Cir. 1982) for a discussion of the facts at issue in *Clayton*.

20. The class in the *Clayton* action was certified on April 6, 1976. It was described as "all past, present and future Black employees of defendant Children's Hospital Medical Center and all past, present, and future Black applicants for employment at Children's Hospital Medical

consent decree that enjoined employment discrimination against class members during the life of the decree.[21] In the decree, "discrimination" was defined by the terms of Title VII. As a result, any conduct violating Title VII would constitute a breach of the consent decree.[22] In addition, the decree established a mandatory grievance procedure that provided for a final and binding resolution of all grievances involving an alleged violation of any provision of the consent decree.[23] A Consent Decree Grievance Committee was created with the responsibility of resolving all grievances arising under the decree. Thus, given that the Hospital's promise to refrain from future discrimination was a provision of the decree and was the equivalent of the Title VII proscription of discrimination, the *Clayton* decree in essence provided that all Title VII claims by the Hospital employees were subject only to final and binding resolution by the Grievance Committee. In 1979, three employees, hired after entry of the decree, filed grievances alleging that the Hospital had discriminated against them during that year. Although the Grievance Committee accepted some of the claims, the majority were rejected.[24] Prior to filing the grievances, however, the employees had filed charges with the EEOC alleging the same facts as in the grievances. Investigating the charges, the EEOC sought enforcement of information subpeonas in federal district court, but enforcement was denied.[25] On appeal, the Ninth Circuit affirmed the lower court decision and held that the EEOC had no jurisdiction to investigate because the employees were precluded from bringing a Title VII suit.[26]

Center." *Id.* at 961 (citing Clayton v. Hosp. Medical Center, No. 74-2165 (N.D. Cal. Dec. 28, 1976) (order approving consent decree)).

21. *See* EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961 (9th Cir. 1982) (Poole, J., dissenting) for a general description of the terms of the decree.

22. The district court, in *EEOC v. Children's Hospital Medical Center*, found that the Title VII claims of the employees were "within the injunction against discrimination" in the decree. On appeal, Judge Schroeder, writing for the majority, stated that the decree "purported to establish the exclusive method for resolution of Title VII employment discrimination claims raised by members of the class." *Id.* at 962.

23. *See id.* at 965 n.2 (Poole, J., dissenting) for a detailed description of the grievance procedure.

24. *See id.* at 962.

25. Section 706(b) of Title VII authorizes the EEOC to investigate charges that are properly filed. 42 U.S.C. § 2000e-5(b) (1982).

26. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961 (9th Cir. 1982). The res judicata issues raised by *Children's Hospital* have unfortunately been left unresolved. On rehearing en banc, the Ninth Circuit held that the EEOC had jurisdiction to investigate the claims of the hospital employees. EEOC v. Children's Hosp. Medical Center, 702 F.2d 1288 (9th Cir. 1983). While the court acknowledged the complexity of the res judicata issue, it decided the case on another ground. The court reasoned that res judicata is an affirmative defense and that the EEOC's agency jurisdiction is not abrogated when the party being investigated may have a valid defense to a subsequent suit by the agency. *Id.*

EEOC v. Children's Hospital Medical Center is particularly troubling because it is unclear whether the court was giving preclusive effect to the Grievance Committee decision or the consent decree itself.[27] On this issue, the following two arguments shall be presented: (1) if the Ninth Circuit was giving preclusive effect to the Grievance Committee decision, *Children's Hospital* is in direct conflict with recent Supreme Court decisions;[28] (2) if the Ninth Circuit was giving preclusive effect to the *Clayton* consent decree, the court erred because *Children's Hospital* and *Clayton* did not arise out of the same series of connected transactions.[29]

Notwithstanding these arguments, there may be cases in which future employees, included in a class action consent judgment, bring a subsequent Title VII action that, unlike *Children's Hospital*, is based on the same series of connected transactions as the original class action.[30] It shall be argued that in such cases (1) the consent judgment should preclude subsequent Title VII actions;[31] and (2) future employees should be included in the Title VII class action and bound by the judgment.[32]

III. THE PRECLUSIVE EFFECT OF THE GRIEVANCE COMMITTEE DECISION

A. *The Preclusive Effect of an Arbitral Decision Under a Collective Bargaining Agreement*

On two occasions the Supreme Court has held that an arbitral decision denying an employee's allegation that the employer violated a nondiscrimination clause does not preclude relitigation of the same claim in federal court. In *Alexander v. Gardner-Denver*,[33] the Court held that an employee's Title VII action was not precluded by prior submission of the same claim to final and binding arbitration under a collective bargaining agreement. The Court reasoned that the contractual and statutory procedures were not mutually exclusive, and that the employee could pursue both

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27. The majority stated that it was applying res judicata. *Id.* at 964. If the court was giving preclusive effect to the grievance committee decision, then both claim preclusion (bar) and issue preclusion (direct estoppel) were applicable. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 84. Settlements, however, do not result in issue preclusion because issues within the scope of the settlement have not been fully litigated. *See id.* at § 27. Therefore, if preclusive effect was given to the consent decree, only claim preclusion was applicable.

28. *See infra* text accompanying notes 33-69.

29. *See infra* text accompanying notes 70-94.

30. It must be noted, however, that the majority assumed *Clayton* and *Children's Hospital* involved the same series of connected transactions. *See infra* text accompanying notes 71-74.

31. *See infra* text accompanying notes 95-122.

32. *See infra* text accompanying notes 123-167.

33. 415 U.S. 36 (1974).

remedies independently.[34] In *McDonald v. City of West Branch*,[35] the Court extended *Gardner-Denver* to actions brought under section 1983 of the 1871 Civil Rights Act.[36] In both cases, the Court reasoned that the arbitration process does not adequately protect the federal rights that Title VII and section 1983 were designed to safeguard.[37] Thus, it is clear that, in employment discrimination cases, arbitration pursuant to a collective bargaining agreement is not a satisfactory substitute for a judicial proceeding.[38]

Collective bargaining agreements commonly contain broad

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34. *Id.* at 52-53.

35. 104 S. Ct. 1799 (1984).

36. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)). Section 1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983 (1982).

37. The Court in *Gardner-Denver* and *McDonald* listed four reasons why arbitration is inferior to a judicial proceeding:

> (1) An arbitrator may not have the expertise required to resolve the complex legal questions that arise in civil rights actions;
> (2) An arbitrator's authority derives solely from the contract;
> (3) The union has exclusive control of processing the grievance, and vigorously processing the employee's grievance may not be in the union's best interests; and
> (4) Arbitral fact finding is generally not the equivalent of judicial fact finding.

McDonald v. City of West Branch, 104 S. Ct. 1799, 1803-04 (1984); Alexander v. Gardner-Denver, 418 U.S. 36, 56-59 (1974).

38. *Cf.* Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728 (1981) (employee's cause of action under the Fair Labor Standards Act not barred by prior submission of claim to grievance committee set up by collective bargaining agreement). The new Restatement (Second) of Judgments is consistent with the Supreme Court's holdings in *Gardner-Denver*, *Barrentine*, and *McDonald*. Section 84(2) of the Restatement provides that "[a]n award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim." RESTATEMENT (SECOND) OF JUDGMENTS § 84(2). Section 84(3) provides that determination of an issue in arbitration does not preclude relitigation of that issue if giving preclusive effect to the arbitral decision would be incompatible with a legal policy or if the arbitral procedure would be inadequate. *Id.* at § 84(3).

There is an argument, however, that under certain limited circumstances res judicata effect may be given to an arbitral decision in an employment discrimination case. The *Gardner-Denver* Court stated that when "an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it *great weight*." Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974). If "great weight" is interpreted to include res judicata effect, then a court could consider all of the factors set forth in *Gardner-Denver's* footnote 21 when deciding whether to give res judicata effect to a consent decree grievance committee decision in a subsequent Title VII suit. However, "great weight" is more properly interpreted to mean only that in a Title VII action a court may accord evidentiary significance to a prior arbitral decision. This reading is consistent with *McDonald* in which the Court stated that an arbitral decision is admissible as evidence in a § 1983 action. McDonald v. City of West Branch, 104 S. Ct. 1799, 1803-04 (1984). It seems then that an arbitral decision is admissible as evidence in a Title VII action, but may not be given res judicata effect even if the court considers all of the factors set forth in *Gardner-Denver's* footnote 21.

grievance and arbitration clauses providing for final and binding resolution of all disputes arising under the contract.[39] Courts will generally give effect to an arbitral decision so long as it draws its essence from the collective agreement.[40] Similar to collective bargaining agreements, consent decrees are agreed-upon compromises of conflicting interests.[41] Just as a collective bargaining agreement may contain procedures for arbitrating disputes arising from the agreement, a consent decree may contain a similar provision for resolution of disputes arising from the day-to-day administration of the decree.

If the Ninth Circuit in *Children's Hospital* was giving preclusive effect to the Grievance Committee decision, its facts seem indistinguishable from those in *Gardner-Denver* and *McDonald*.[42] The collective bargaining agreement in *Gardner-Denver* and *McDonald*, and the consent decree in *Children's Hospital*, each contained a nondiscrimination clause, as well as a provision for final and binding resolution of disputes arising out of the agreement. Moreover, in each case an employee unsuccessfully processed a grievance alleging that the employer violated the nondiscrimination clause and filed an employment discrimination action alleging the same operative facts that comprised the grievance.

In *Gardner-Denver*, the Supreme Court rejected the employer's argument that the employee waived all rights under Title VII by choosing to process his grievance through arbitration.[43] While the Court noted that an employee may voluntarily and knowingly waive his Title VII rights as part of a settlement,[44] it held that in no event would submission of a grievance to arbitration under the nondiscrimination clause of the agreement constitute a voluntary and knowing waiver of Title VII rights.[45] In *McDonald*, the Court rejected a similar argument that an arbitral decision should be given preclusive effect under the Full Faith and Credit Statute.[46]

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39. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 541-43 (1976).

40. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) (these cases are commonly known as the *Steelworkers Trilogy*).

41. *See* United States v. ITT Continental Baking Co., 420 U.S. 223 (1975).

42. Note, however, that *Children's Hospital* predates *McDonald*.

43. Alexander v. Gardner-Denver, 415 U.S. 36, 49-52 (1974).

44. *Id.* at 52 & n.15.

45. *Id.* at 52. The Supreme Court, however, did not define "voluntary and knowing" consent.

46. McDonald v. City of West Branch, 104 S. Ct. 1799, 1802 (1984). The Full Faith and Credit Statute provides in pertinent part:

> [J]udicial proceedings of any court of any . . . State, Territory, or Possession, . . .

The Court held that the Statute requires only that res judicata effect be given to "judicial proceedings," and that arbitration is not a "judicial proceeding."[47] The Court then stated that it would not fashion a rule of preclusion in the case because the policy reasons given in *Gardner-Denver* for rejecting the doctrines of election of remedies and waiver were equally applicable to the doctrine of res judicata.[48]

Applying the Supreme Court's decision in *Gardner-Denver* to the facts in *Children's Hospital*, it is clear that submitting the Hospital employees' grievances to the Grievance Committee did not constitute a voluntary and knowing waiver of their Title VII rights. In the face of this apparent conflict with the Supreme Court, the majority in *Children's Hospital* relied on the doctrine of res judicata to preclude the employees' Title VII claims, rather than on choice of remedies and waiver as applied in *Gardner-Denver*.[49] As previously noted, however, the distinction between waiver and res judicata was found to be inconsequential by the Supreme Court in *McDonald*.[50] Thus, the result in *Children's Hospital* is not justified by the court's reliance on res judicata. Nevertheless, the Ninth Circuit also distinguished *Gardner-Denver* on the ground that a consent decree is not the same as a collective bargaining agreement because a consent decree carries the stamp of judicial approval.[51] The significance of this distinction is discussed below.[52]

B. *Judicial Approval of the Grievance Procedure*

Given the Supreme Court's refusal to give preclusive effect to

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> within the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.

28 U.S.C. § 1738 (1982). The Full Faith and Credit Statute obliges federal courts to give a state court judgment the same res judicata effect as it would be given in a court of the state. *See* McDonald v. City of West Branch, 104 S. Ct. 1799, 1802 (1984); Migra v. Warren City School Dist., 104 S. Ct. 892, 896 (1984); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982).

47. McDonald v. City of West Branch, 104 S. Ct. 1799, 1802 (1984). The Court stated that the plain language of § 1738 indicates that only "judicial proceedings" must be given preclusive effect, but it gave no reasons for its conclusion that arbitration is not a "judicial proceeding." *Id.*

48. McDonald v. City of West Branch, 104 S. Ct. 1799, 1802 n.8 (1984) (citing Alexander v. Gardner-Denver, 415 U.S. 39, 49 n.10 (1974)). These policy reasons related primarily to the inferiority of arbitration to a court proceeding. *See supra* note 37.

49. EEOC v. Children's Hospital Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 962-63 (9th Cir. 1982).

50. McDonald v. City of West Branch, 104 S. Ct. 1799, 1802 n.8. Note again that *Children's Hospital* predates *McDonald*.

51. EEOC v. Children's Hospital Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 962 (1982).

52. *See infra* text accompanying notes 53-69.

an arbitral decision pursuant to a collective bargaining agreement,[53] a threshold issue for consideration is whether a prior adverse decision in another forum may ever bar a Title VII suit on the same claim. In this regard, the Supreme Court has interpreted Title VII to provide a private right of action to individuals claiming to be victims of employment discrimination, and a corresponding right to a trial de novo.[54] However, the right to a trial de novo on individual discrimination claims has been tempered somewhat by two recent Supreme Court decisions in which the Court has held that there is no absolute private right of action to litigate discrimination claims in federal court.[55]

In *Allen v. McCurry*, [56] a state criminal defendant brought an action for damages under section 1983, claiming that the police officers who arrested him had conspired to violate his fourth amendment right to be free from unreasonable search-and-seizure. The Supreme Court held that the rule of issue preclusion barred the defendant from relitigating the search-and-seizure issue in federal court inasmuch as the same constitutional issue had already been fully litigated in the state courts.[57]

In *Kremer v. Chemical Construction Corp.*,[58] the Court again ruled to preclude relitigation of a state-tried civil rights claim in federal court. The Court held that, under the Full Faith and Credit Statute,[59] Rubin Kremer's Title VII suit against the Chemical Construction Corporation was barred by a New York trial court decision in a suit involving the same claim, but brought by Kremer under the state statutory equivalent to Title VII.[60] The Supreme Court found the federal action to be precluded even though the state court had merely affirmed a state administrative agency's decision that Kremer's discrimination claim was meritless.[61]

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53. *See supra* text accompanying notes 33-48.

54. The Court has held that an individual may sue to vindicate his Title VII rights despite an adverse decision on the same facts by a state administrative agency, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 477 (1982); by a federal administrative agency, Chandler v. Roudebush, 425 U.S. 840, 853-54 (1975); by an arbitrator, Alexander v. Gardner-Denver, 415 U.S. 36, 59-60 (1974); and by the EEOC, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973). Furthermore, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court held that a federal court judgment denying an employee's claim under 42 U.S.C. § 1981 did not bar the employee's Title VII claim based on the same events.

55. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980).

56. 449 U.S. 90 (1980).

57. *Id.* at 100-05.

58. 456 U.S. 461 (1982).

59. *See supra* note 46 for the pertinent text of the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982).

60. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 462-67 (1982).

61. *Id.* at 466-67.

Thus, despite the fact that the process accorded Kremer in the state court was limited to a deferential review of the administrative record without a full-scale judicial inquiry into Kremer's discrimination claim,[62] the Supreme Court refused to allow Kremer to relitigate his claim in federal court under Title VII.

In *Kremer*, the Supreme Court distinguished *Alexander v. Gardner-Denver* by noting that Kremer's statutory right to a trial de novo was satisfied because there had been a prior judicial decision.[63] The Ninth Circuit, in *Children's Hospital*, relied on this aspect of *Kremer* to distinguish *Gardner-Denver*.[64] It is important to note, however, that the Supreme Court's holdings in *Gardner-Denver* and *McDonald v. City of West Branch* were limited to the preclusive effect of arbitral decisions under collective bargaining agreements in employment discrimination cases. *Children's Hospital*, on the other hand, involved an arbitral determination made pursuant to a judicially approved consent decree. Thus, it may be argued that *Gardner-Denver* was distinguishable from *Children's Hospital* because judicial approval of the *Clayton* decree functioned as approval of decisions of the Grievance Committee similar to the state court's approval of the administrative decision involved in *Kremer*.

At first blush, the facts of *Kremer* and *Children's Hospital* appear quite similar. In *Kremer*, the same operative events were at issue in the administrative proceeding as in the Title VII suit.[65] Similarly, in *Children's Hospital*, the same operative events were at issue in the grievance proceedings as in the Title VII suit.[66] In *Kremer*, the Supreme Court gave res judicata effect to what was no more than a state court's deferential approval of an administrative ruling.[67] Therefore, it may be argued that, on the authority of *Kremer*, res judicata effect was appropriately given to the Grievance Committee decision in *Children's Hospital* because the grievance procedure carried a stamp of judicial approval similar to that given to the administrative ruling in *Kremer*.

Upon closer scrutiny, however, this analogy to *Kremer* fails

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62. *Id.* at 482-85.

63. *Id.* at 477-78.

64. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 963 (9th Cir. 1982). The court stated that *Kremer* "eliminates any doubt that a federal court judgment encompassing a Title VII claim precludes further pursuit of Title VII remedies with respect to that claim." *Id.*

65. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 463-65 (1982).

66. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 962 (9th Cir. 1982).

67. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982).

because the facts in *Children's Hospital* were actually the opposite of those in *Kremer*. In *Kremer*, res judicata effect was given to the state court's approval of the administrative decision itself, not to the state court's approval of the agency's right to decide discrimination claims. Conversely, while the *Clayton* court approved the consent decree's grant of authority to the Grievance Committee, there was no judicial approval of the Grievance Committee decision on the claim litigated.

Moreover, the Supreme Court's post-*Kremer* decisions in *McDonald v. City of West Branch*[68] and *Migra v. Warren City School District Board of Education*[69] demonstrate that, in applying the Full Faith and Credit Statute to employment discrimination cases, the Court has drawn a clear distinction between giving preclusive effect to arbitral decisions and giving preclusive effect to state court judgments. Inasmuch as an arbitral decision is not a "judicial proceeding," the Full Faith and Credit Statute does not mandate that arbitral decisions be given preclusive effect.[70]

Thus, it is clear that giving res judicata effect to the Grievance Committee decision in *Children's Hospital* was not the same as giving res judicata effect to the state court's approval of the administrative determination in *Kremer*. Consequently, if preclusive effect was being given to the Grievance Committee decision, *Kremer* was not directly on point despite the Ninth Circuit's argument to the contrary. Instead, the Supreme Court's holding and reasoning in *Gardner-Denver* should have been controlling in the case because of the factual similarity of *Gardner-Denver* and *Children's Hospital*. The Ninth Circuit, however, relied on *Kremer*, not *Gardner-Denver*, and as a result, reached an erroneous conclusion.

IV. THE SCOPE OF THE CLAIM

If the Ninth Circuit in *Children's Hospital* was giving preclusive effect to the Grievance Committee decision, its holding was seemingly in direct conflict with the Supreme Court's decision in

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68. 104 S. Ct. 1799, 1802 (1984) (holding that the Full Faith and Credit Statute does not require federal courts to give preclusive effect to arbitration decisions).

69. 104 S. Ct. 892 (1984). In *Migra*, a supervisor of elementary education obtained a judgment in an Ohio court for breach of contract and wrongful interference with her contract of employment. Subsequently, the supervisor brought a § 1983 action based on the same claim. The Supreme Court held that the state court judgment was entitled to preclusive effect under the Full Faith and Credit Statute even though the discrimination claim had not been litigated. *Id.* at 898.

70. *See supra* text accompanying note 43.

Gardner-Denver.[71] It, therefore, may be assumed that the court was giving preclusive effect to the *Clayton* decree rather than the Grievance Committee decision. If so, the major difference between the majority and the dissent was whether *Children's Hospital* and *Clayton* involved the same claim.[72] In this regard, the majority simply assumed that both proceedings involved essentially the same series of connected transactions.[73] Judge Poole, in dissent, contested the majority's assumption. He argued that the events on which the two actions were based were necessarily different by pointing out that the employees involved in *Children's Hospital* were hired after entry of the *Clayton* decree and that the events upon which their grievances and EEOC charges were based occurred after they were hired.[74] Indeed, notwithstanding the merits of either the majority or the dissent's interpretation of the scope of the claim in *Clayton*, it is clear that the Hospital employees' EEOC charges were based on post-decree conduct.[75]

The best argument supporting the majority's unstated assumption that *Children's Hospital* and *Clayton* involved the same claim is that both proceedings arose from the same "series of connected transactions" within the meaning of the Second Restatement of Judgments.[76] Section 24(1) of the Restatement provides that "(w)hen a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[77] Inasmuch as the conduct at issue in the two proceedings was of the same general type, it may be argued that the Hospital's continued violation of Title VII was no more than a series of connected transactions. Comment d following section 24 seems to support this argument by providing that "(w)hen a defendant is accused of . . . acts which though occurring over a period of time were substantially

71. *See supra* text accompanying notes 33-69.

72. *See supra* note 9 for the definition of "claim."

73. A number of statements in the majority opinion indicate that the court thought *Clayton* and *Children's Hospital* involved the same claim or series of connected transactions. For example, the court stated that "here there is a prior judgment encompassing *these* Title VII claims." EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 962 (9th Cir. 1982) (emphasis added). The court also stated, in support of its holding, that "a federal court judgment encompassing a Title VII claim precludes further pursuit of Title VII remedies with respect to *that* claim." *Id.* at 963.

74. *Id.* at 967-68 (Poole, J., dissenting).

75. *Id.*

76. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 24.

77. *Id.* at § 24(1).

of the same sort and similarly motivated, fairness to the defendant . . . may require that they be dealt with in the same action."[78] Thus, based on Restatement section 24, it may be argued that *Children's Hospital* was correctly decided because the Hospital was accused of conduct substantially similar to that adjudicated in *Clayton*.

To accept this interpretation of the Restatement in *Children's Hospital*, the temporal scope of the series of connected transactions making up the claim in *Clayton* (in effect, the Hospital's continued violation of Title VII) must extend beyond the time of judgment. In other words, the claim extinguished in *Clayton* included events or transactions occurring after entry of the *Clayton* decree, The better view, however, is that *Clayton* and *Children's Hospital* involved different claims. Although the approach of the new Restatement is an expansion of the traditional common law conception of "claim" or "cause of action,"[79] the American Law Institute probably did not contemplate expansion of the temporal limits of "claim" beyond the time when judgment is entered.[80] Moreover, comment d indicates that the rationale for expanding the outer limits of "claim" is fairness to the defendant.[81] Inasmuch as the conduct at issue in *Children's Hospital* occurred after entry of the *Clayton* decree, it was not unfair to the Hospital to subject it to liability for post-decree violations of Title VII because those specific violations had never been adjudicated. On the contrary, concluding that *Children's Hospital* and *Clayton* involved the same claim seems unfair to the employees because the precise conduct at issue in *Children's Hospital* could not have been litigated in *Clayton*.

In addition to lacking persuasive support in the Restatement itself, defining the claim in *Clayton* to include events occurring after entry of judgment is at odds with two converging lines of Supreme Court decisions. In one line of decisions the Court has held that res judicata has no effect on rights arising from post-judgment events. While neither *Alexander v. Gardner-Denver* nor *Kremer v. Chemical Construction Corp.* specifically dealt with the issue, the Supreme Court has held in other contexts that claim preclusion does not operate to bar rights arising subsequent to entry of a con-

78. *Id.* at § 24(l) comment d.
79. *Id.* § 24 reporter's note.
80. The Restatement was drafted by the American Law Institute.
81. *See supra* text accompanying note 77.

sent decree or order. In *commissioner v. Sunnen*,[82] the Court held that a judgment on the merits of a tax claim would not preclude litigation of an identical claim of right arising in a later tax year. Similarly, in *Lawlor v. National Screen Services*,[83] the Court held that a prior adverse judgment in an antitrust case did not prevent the plaintiff from bringing a suit alleging post-judgment violations of the antitrust laws. In *Lawlor* the claims involved essentially the same kind of conduct adjudicated in the original action. The Court stated that "while the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which do not even then exist and which could not possibly have been sued upon in the previous case."[84] Consequently, while the Supreme Court has noted that courts have an obligation to "render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future,"[85] *Sunnen* and *Lawlor* make it clear that the availability of prospective relief does not prevent parties to an action from bringing actions challenging post-decree violations of Title VII.

The Fourth Circuit applied *Sunnen* and *Lawlor* to a civil rights class action in *Crowe v. Leeke*.[86] In *Crowe*, the court held that a prior section 1983 class action consent judgment did not bar a class member from bringing a subsequent section 1983 action to challenge acts occurring after entry of the decree.[87] According to the court, claim preclusion "has very little applicability to a fact situation involving a continuing series of acts, for generally each act gives rise to a new cause of action."[88] Thus, *Sunnen*, *Lawlor*, and *Crowe* clearly indicate that the Restatement definition of "claim" should not be interpreted to include post-judgment events.

Futhermore, defining the claim in *Clayton* to include events occurring after judgment is at odds with another line of Supreme Court decisions in which the Court has held that public rights, including Title VII rights, may not be waived prospectively. In *Brooklyn Savings Bank v. O'Neil*[89] and *Midstate Horticultural Co.*

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82. 333 U.S. 591 (1948).
83. 349 U.S. 322 (1955).
84. *Id.* at 328.
85. International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).
86. 550 F.2d 184 (4th Cir. 1977).
87. *Id.*
88. *Id.* at 187.
89. 324 U.S. 697 (1945) (in the absence of a bona fide dispute between employer and

v. Pennsylvania Ry. Co.[90] the Court held that when a statutory right is conferred on an individual to effectuate a legislative policy, the right may not be waived or released by him prospectively.[91] Given that Title VII rights are conferred on individuals to effectuate the Congressional policy of remedying discrimination,[92] the Court held in *Alexander v. Gardner-Denver* that Title VII rights may not be waived prospectively in the collective bargaining process.[93] The Court reasoned that the paramount Congressional purpose behind Title VII is to insure that employees are to be free from discriminatory practices, and that prospective waiver of Title VII rights, even outside of the collective bargaining process, would defeat this purpose.[94]

In *Brooklyn Savings Bank, Midstate Horticultural Co.,* and *Gardner-Denver*, the Court invalidated a contractual provision that purported to waive prospectively a statutory right. Settlement agreements are indistinguishable from the contracts in those cases because the Supreme Court has repeatedly held that, for purposes of enforcement, a consent decree is to be treated as a contract.[95] Thus, the gloss of judicial approval on the settlement agreement does not take the consent decree outside of the rule that important statutory rights, such as Title VII rights, cannot be waived prospectively. In *Children's Hospital*, the Hospital employees were hired after entry of the *Clayton* decree, and their Title VII claims also arose after entry of the decree. Assuming that the majority in *Children's Hospital* was giving preclusive effect to the decree,

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employee, the employee's release of rights to liquidated damages under the Fair Labor Standards Act does not bar subsequent exercise of those rights).

90. 320 U.S. 356 (1943) (express agreement to shorten the statute of limitations under the Interstate Commerce Act is void as against public policy).

91. *Cf.* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) (rejects argument that release of one joint tortfeasor in an antitrust suit operates to release all on the ground that private suits are an essential weapon for effective enforcement of the antitrust laws); Wilko v. Swan, 346 U.S. 427 (1953) (agreement between seller and purchaser of securities to arbitrate all future controversies arising from the transaction is void under § 14 of the 1933 Securities Act which declares void any agreement "binding any person aquiring any security to waive compliance with any provision" in the Act); Redel's, Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974) *and* Gaines v. Carrollton Tobacco Bd. of Trade, 386 F.2d 757 (6th Cir. 1967) (settlements which absolve a party from liability for future violations of the antitrust laws are clearly against public policy and, therefore, void as applied prospectively).

92. *See supra* note 2.

93. Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974).

94. *Id.*

95. *See* United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975); United States v. Armour & Co., 402 U.S. 673 (1971); United States v. Atlantic Refining Co., 360 U.S. 19 (1959); Hughes v. United States, 342 U.S. 353 (1952). *But cf.* United States v. Swift & Co., 286 U.S. 106, 115 (1932) (for purposes of modification, a consent decree is to be treated as a judicial act rather than a contract).

the court improperly sanctioned prospective waiver of Title VII rights. The majority opinion is, therefore, in conflict with the holdings of the Supreme Court in *Brooklyn Savings Bank*, *Midstate Horticultural Co.*, and *Gardner-Denver*.

In summary, the Restatement's definition of claim should not be interpreted to extinguish rights arising after the time of judgment because the Supreme Court has held that res judicata has no effect on claims arising from post-judgment events. Consequently, the Ninth Circuit should have concluded that *Children's Hospital Medical Center* and *Clayton* involved different claims. Moreover, barring the Title VII rights asserted in *Children's Hospital* sanctioned the prospective waiver of public rights in contravention of the Supreme Court's position on the issue. Inasmuch as the employees were alleging discriminatory practices by the Hospital subsequent to entry of the decree, their complaints could not have been raised in the *Clayton* action. Therefore, the Ninth Circuit should have held that the Title VII rights asserted in *Children's Hospital* were not extinguished by settlement of the *Clayton* claim.

V. FUTURE EMPLOYEES BRINGING A TITLE VII ACTION BASED ON THE SAME CLAIM

A. *The Preclusive Effect of the Consent Decree*

Although the Ninth Circuit should have concluded that *Children's Hospital* and *Clayton* involved different claims,[96] there may be other instances when future employees included in a class action consent judgment bring a subsequent Title VII action based on the *same* claim. For the sake of discussion, it will be assumed that the majority in *Children's Hospital* was correct in implicitly holding that the two proceedings involved the same series of connected transactions.[97] Viewed as such, the persuasiveness of the majority's res judicata analysis turns on whether the consent decree satisfied the Title VII trial de novo requirement. In other words, even if *Children's Hospital* and *Clayton* involved the same claim, the Hospital employees hired after entry of the decree were entitled to a trial de novo under Title VII.[98] Thus, if the consent decree itself was not the equivalent of a trial de novo, then the Hospital employees have the right to litigate their Title VII claims

96. *See supra* text accompanying notes 71-94.
97. *See supra* note 72 and accompanying text.
98. *See generally supra* note 50 and cases cited therein.

in federal court. Although both sides of the issue are analyzed in this Comment, it is argued herein that a class action consent decree satisfies the trial de novo right of future employees included in the class.[99]

The majority in *Children's Hospital* stated that *Kremer v. Chemical Construction Corp.* "eliminates any doubt that a federal court judgment encompassing a Title VII action precludes further pursuit of Title VII remedies with respect to the claim."[100] Nonetheless, *Kremer* does not necessitate the conclusion that a class action consent decree qualifies as a trial de novo within the meaning of Title VII.[101] In *Kremer*, the court's decision to bar Rubin Kremer's Title VII suit rested heavily on a perceived conflict between Title VII and the Full Faith and Credit Statute.[102] The Court held that without an affirmative showing of a clear and manifest Congressional purpose to impliedly repeal the Full Faith and Credit Statute as applied to state court discrimination decisions, it would not recognize an exception to the rule of preclusion in the Statute.[103] The Court enunciated two important considerations in its decision: (1) the policy of promoting the spirit of comity between federal and state courts that underlies the Full Faith and Credit Statute;[104] and (2) the Congressional intent to give effect to state nondiscrimination laws.[105] Accommodating these federalism concerns, the Court held that the state administrative and judicial adjudication of Kremer's employment discrimination claim satisfied the Title VII trial de novo requirement.[106]

The federalism concerns of the *Kremer* Court, however, have no application in a Title VII case involving the preclusive effect of a consent decree approved by a *federal* court. Given the importance of these federalism concerns in *Kremer*, it is not at all clear that the Court would have ruled that a federal court's approval of a class action consent decree satisfies the trial de novo requirement. Thus,

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99. *See infra* text accompanying notes 99-167.

100. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 963 (9th Cir. 1982).

101. *See supra* text accompanying notes 53-69 for a discussion of *Kremer* in another context.

102. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466-77 (1982).

103. *Id.* at 485.

104. *Id.* at 478. *See also* Migra v. Warren City School Dist., 104 S. Ct. 892 (1984) (stating that the Full Faith and Credit Statute "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims").

105. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 472 (1982).

106. *Id.* at 476-78.

the Ninth Circuit's reliance on *Kremer* to support its holding in *Children's Hospital* extended the *Kremer* holding significantly beyond its rationale.

In addition, Judge Poole, dissenting in *Children's Hospital*, argued that giving preclusive effect to the *Clayton* decree ignored the principle that a consent decree is to be treated as a contract for purposes of interpretation and enforcement.[107] While Judge Poole did not elaborate any further, he was apparently arguing that, construed as a contract, the *Clayton* decree was less analogous to the state court judgment in *Kremer* than the majority implied. This argument, although deceptively appealing, subtly misses the mark because the majority in *Children's Hospital* was giving preclusive effect to the *Clayton* court's approval of the settlement agreement, not the agreement itself. Similarly, the Supreme Court in *Kremer* gave preclusive effect to the state court's approval of the administrative determination, not the determination itself or the agency's authority to decide employment discrimination cases. Thus, in both *Children's Hospital* and *Kremer*, preclusive effect was given to a *prior judicial determination*. In addition, the *Kremer* Court placed considerable emphasis on the procedural safeguards built into New York's administrative code.[108] Certainly, a federal court's procedure in deciding whether to approve a class action settlement is the equivalent of a state court's approval of an administrative determination. Thus, notwithstanding Judge Poole's argument to the contrary, the *Clayton* decree indeed may have satisfied the *Kremer* interpretation of the trial de novo requirement.

In further support of the proposition that a class action consent decree satisfies the trial de novo requirement of Title VII, it may be argued that class member employees, hired after entry of a decree, voluntarily and knowingly consent to its preclusive effect.[109] In *Children's Hospital*, the Ninth Circuit implicitly accepted this argument by stating that the constitutional due process rights of the Hospital employees were not violated because the employees (1) knew of the decree; (2) had not raised any objec-

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107. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 966 (Poole, J., dissenting) (citing United States v. ITT Continental Baking Co., 420 U.S. 223 (1975)).

108. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483-85 (1982).

109. *See* Alexander v. Gardner-Denver, 418 U.S. 36, 52 n.15 (1974), in which the Supreme Court stated that "(p)resumably an employee may waive his cause of action under Title VII as part of a voluntary settlement," but the employee's consent to waiver must be "voluntary and knowing." *Id.* The Court, however, did not define "voluntary and knowing" consent. *See also supra* text accompanying notes 43-45.

tions to its terms; and (3) were adequately represented in the *Clayton* action.[110]

Alexander v. Gardner-Denver makes this argument no less persuasive. To some extent, of course, the facts of *Gardner-Denver* are very similar to *Children's Hospital*. Just as the employees in *Children's Hospital* raised no objections to the *Clayton* decree, there is no record in *Gardner-Denver* that the employees of the Gardner-Denver Company raised any objections to the nondiscrimination clause in the collective bargaining agreement. Indeed, although the Court in *Gardner-Denver* did not define voluntary and knowing consent, it unequivocally held that submission of a claim to arbitration and employee acquiescense to the terms of a contract negotiated for their benefit by the union does not constitute a waiver of Title VII rights.[111] Unlike *Clayton* and *Children's Hospital*, however, *Gardner-Denver* did not involve a class action. While the issue in *Gardner-Denver* was whether the employees consented to an unexpressed waiver of Title VII rights in a collective bargaining agreement, the issue in *Children's Hospital* was whether members of a rule 23 class consented to a judicially-approved consent decree. Subdivision (c)(3) of rule 23 provides that a class action judgment is binding on all members of the class, whether favorable or not.[112] To give effect to rule 23, consent to waiver of Title VII rights arising out of the claim involved in the class adjudication should be implied when the individual class members were adequately represented by the named plaintiffs.[113]

The Ninth Circuit argued that if the consent decree was not given the same preclusive effect as the state court judgment in *Kremer*, there would be little incentive for employers to settle Title VII cases.[114] In this regard, the court stated that in a Title VII class action the consent decree's preclusive effect on the claims of absent class members is a major factor inducing employer defendants to settle.[115] In *Gardner-Denver*, on the other hand, even assuming that the employer's agreement to the broad arbitration clause in the collective bargaining agreement was expressly con-

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110. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 964 (9th Cir. 1982).

111. *See supra* text accompanying notes 43-45.

112. *See supra* note 9 for the text of rule 23(c)(3).

113. *See supra* note 108.

114. EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 963 (9th Cir. 1982).

115. *Id.*

ditioned on waiver of Title VII rights,[116] the employer had other material incentives to agree to an arbitration clause.[117] Specifically, in collective bargaining, the employer receives the benefit of a no-strike pledge from the union as the quid pro quo for inclusion of a broad arbitration clause in the contract.[118] The union's promise not to strike is a very valuable concession to the employer, and provides the employer sufficient economic incentive to agree to the broad arbitration clause. In the context of a class action settlement, however, the major incentive for the employer to agree to the terms of a consent decree is the decree's preclusive effect. If the consent judgment does not shield the employer-defendant from individual Title VII actions based on the same claim, the employer will be much less inclined to voluntarily agree not to discriminate. Given the importance of encouraging voluntary settlement of discrimination claims in the overall remedial scheme of Title VII,[119] future employees included in the class should be considered to have voluntarily and knowingly waived[120] all Title VII rights arising out of a previously adjudicated claim when they are notified of the class action consent decree including them in the class. These class members, however, would retain all Title VII rights arising from post-judgment events involving employer conduct that was not part of the series of connected transactions adjudicated in the prior action.[121] Moreover, the employees could still obtain judicial review of the consent judgment if their interests were *not* adequately represented by the class representatives in this action.[122] Thus, the class action consent judgment would preclude the Title VII action of future employees only if the employees (1) sought to relitigate the same series of connected transactions; and (2) were adequately represented in the prior action.

In summary, all rights of future employees included in the class arising out of the same series of connected transactions at issue in the class action should be extinguished by the consent judg-

116. In fact it was not. Alexander v. Gardner-Denver, 418 U.S. 36, 52 n.15 (1974).

117. Similar to the Title VII policy of encouraging settlement of employment discrimination claims, a fundamental policy of federal labor law is to encourage voluntary settlement of industrial disputes by arbitration. *See* L. MODJESKA, NLRB PRACTICE 315 (1983) *and* cases cited therein.

118. *See* Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

119. *See supra* text accompanying note 3.

120. *See supra* note 108 and text accompanying notes 43-45.

121. *See supra* text accompanying notes 71-94.

122. *See infra* text accompanying notes 123-67.

ment. Despite the federalism considerations in *Kremer*,[123] that case should be read broadly to mean that a class action consent judgment rendered by a federal court extinguishes all Title VII rights arising out of the same claim. A narrower reading of *Kremer* is inconsistent with the doctrine of res judicata embodied in rule 23 and the Title VII policy of encouraging settlements.

B. *The Propriety of Including Future Employees in a Class Action Consent Judgment*

A decision to preclude the Title VII action of an individual because of a class action consent decree entered into prior to the individual's employment by the employer-defendant raises issues concerning individual notice under rule 23 and the United States Constitution. In *Hansberry v. Lee*,[124] the Supreme Court held that the adjudication of the claims of unnamed class members does not violate their Constitutional due process rights so long as their interests are adequately represented. Determining whether the named parties adequately represent the interests of unnamed class members, however, is a difficult task. The difficulty in determining adequacy of representation creates a significant amount of uncertainty about the preclusive effect of the class action judgment.[125] This, in turn, invites collateral attack by dissatisfied class members and discourages reliance by the employer-defendant.[126] Thus, the preclusive effect of a class action judgment makes the question of adequacy of representation very important, especially when future employees are included in the class.

Federal courts have split on the issue of whether it is proper to include future employees in a rule 23 class.[127] In these cases,

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123. *See supra* text accompanying notes 99-105.

124. 311 U.S. 32 (1940).

125. Rutherglen, *supra* note 4, at 75.

126. *Id.* The res judicata effect of a judgment can only be determined in a subsequent proceeding. *See* C. WRIGHT & A. MILLER, *supra* note 4, at § 1789. An attack on a judgment in a subsequent procedure is commonly called a "collateral attack." *See* 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶0.407 (2d ed. 1984) ("A collateral attack is an attempt to avoid, defeat, or evade a judicial decree, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it.") *See also* Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1060 (1954).

127. For cases including future employees in the class, see: Hebert v. Monsanto Co., 682 F.2d 1111 (5th Cir. 1982); Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978); Black Grievance Committee v. Philadelphia Elec. Co., 79 F.R.D. 98 (E.D. Pa. 1978); Woffard v. Safeway Stores, 78 F.R.D. 460 (N.D. Cal. 1978); Inmates, D.C. Jail v. Jackson, 416 F. Supp. 119 (D.D.C. 1976); Branham v. General Elec., 63 F.R.D. 667 (M.D. Tenn. 1974). *See also* cases cited in Rutherglen, *supra* note 4, at 44 n.127.

For cases refusing to include future employees in the class, see: Edwards v. Schlesinger,

the underlying question is whether unnamed class members must receive notice of the action or a proposed settlement to be bound by the judgment. Arguably, future employees included in the class have the right under subdivision (e) of rule 23 to be notified prior to a settlement.[128] It may also be argued that including unnamed class members in a rule 23(b)(2) class action, without giving them notice of the action and the right to opt out of the class, violates their Constitutional right to due process of law.[129]

There are no controlling Constitutional decisions on whether actual notice of a proposed settlement must be given to unnamed class members to protect their Constitutional due process rights.[130] Subdivision (e) of rule 23 requires the court to give class members notice of a proposed compromise or dismissal in such manner as the court directs.[131] Some courts have held that this provision of rule 23 requires prior notice to class members before a proposed settlement is approved.[132] Because by definition future class members are not identified before a settlement is approved, it is impossible for the court to notify them of the proposed compromise.[133] Therefore, it may be argued that inasmuch as it is impossible to give prior notice to future class members, any class action settlement that purports to extinguish their rights violates rule 23(e).[134] If this argument is accepted, the complainants in *Children's Hospital* were improperly included in the *Clayton* class because they were not employed by the Hospital at the time of judgment. Consequently, the *Clayton* action did not extinguish their Title VII rights.

The better rule, however, is that, even without prior notice, future employees are bound by the class action judgment so long

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377 F. Supp. 1091 (D.D.C. 1974), *rev'd on other grounds*, 509 F.2d 509 (D.C. Cir. 1974); Harvey v. Stein Printing Co., 19 Fed. R. Serv. 2d (Callaghan) 1072 (N.D. Ga. 1973). *See also* cases cited in Rutherglen, *supra* note 4, at 44 n.125.

128. *See infra* text accompanying notes 129-44.

129. *See infra* text accompanying notes 145-67.

130. *See* MANUAL FOR COMPLEX LITIGATION § 1.45 (1982).

131. Subdivision (e) provides that, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

132. *See, e.g.*, Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); Kemp v. Birmingham News Co., 608 F.2d 1049 (5th Cir. 1979); Quigley v. Braniff Airways, Inc., 85 F.R.D. 74 (N.D. Tex. 1979); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979); Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters and Joiners Dist. Council, 459 F.2d 579 (6th Cir. 1972).

133. Hansberry v. Lee, 311 U.S. 32 (1940), however, does not require giving notice when it is not feasible to do so. *See* MANUAL FOR COMPLEX LITIGATION § 1.45 (1982).

134. *Cf.* Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981) (claim preclusion does not bar action if notice of prior class action judgment was inadequate).

as the evidence indicates that their interests were adequately represented. One of the chief abuses that rule 23 was designed to prevent is prejudice to the rights of individual class members arising from a lack of notice of the class action.[135] Professors Wright and Miller state, however, that there is authority for the proposition that failure to give notice of settlement is not error when the rights of the absent class members are not prejudiced.[136] Furthermore, rule 23, by its own terms, presupposes that notice of a proposed settlement is not a precondition to court approval of that settlement.[137] Subdivision (e) merely requires that notice be given as the court directs.[138]

Requiring notice of the action and a proposed settlement affords unnamed class members the opportunity to raise objections so that the court can adequately evaluate any potential prejudice to their rights. Failure to give notice prior to entry of a consent decree, however, does not necessarily prejudice the rights of individual class members.[139] If future class members have objections to the settlement, they may petition the court supervising enforcement of the decree for a modification to account for changed circumstances.[140] For example, in a Title VII class action, such as *Children's Hospital*, the court may evaluate objections raised during the life of the decree and decide whether the decree adequately protects the interests of the employees hired after entry of the decree.[141] In *Children's Hospital*, the Ninth Circuit noted that the Hospital employees received notice of the decree at the time they were hired.[142] The court also noted that the employees made no allegation that they were not adequately represented in *Clayton*;[143] nor did the employees raise any issues that had not

135. *See* Wolf v. Barkes, 348 F.2d 994, 995 (2d Cir.), *cert. denied*, 382 U.S. 941 (1965); Craftsman Fin. & Mortgage Co. v. Brown, 64 F. Supp. 168, 178 (S.D.N.Y. 1945).

136. *See* 7A C. WRIGHT & A. MILLER, *supra* note 5, § 1797, at 234 (1972 & Supp. 1983). *See also* Polakoff v. Delaware Steeplechase & Race Ass'n, 264 F. Supp. 915, 917 (D. Del. 1966); Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D.N.Y. 1949).

137. *See* MANUAL FOR COMPLEX LITIGATION § 1.45 (1982).

138. FED. R. CIV. P. 23(e).

139. Zients v. LaMorte, 459 F.2d 628 (2d Cir. 1972).

140. The Supreme Court, in United States v. Swift & Co., 286 U.S. 106 (1932), stated that "(A) court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." *Id.* at 114-15. *See also* United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968); State v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855); Safe Flight Instrument Corp. v. United Control, 576 F.2d 1340 (9th Cir. 1978); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.16(6), n.1 (2d ed. 1983).

141. *See* EEOC v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 961, 964 (9th Cir. 1982).

142. *Id.*

143. *Id.*

been considered by the district court in *Clayton*.[144] Therefore, the court correctly reasoned that treating the future employees as class members did not prejudice their rights under rule 23.[145]

Alternatively, it may be argued that including future employees in a rule 23(b)(2) class violates their constitutional due process rights. When a class is certified under subdivision (b)(3) of rule 23, the court is required to give absent class members notice and the right to opt out of the class.[146] However, rule 23 does not expressly require either notice or the right to opt out in class actions certified under subdivision (b)(2).[147] Nevertheless, some federal courts have held that the federal Constitution requires notice and the right to opt out of the class in subdivision (b) (2) class actions.[148] According to these courts, an individual's due process rights are violated if the individual is not given a choice of whether to be included in the class.[149] Inasmuch as future class members are not identified before certification of the class, they could not be given notice of their right to opt out of the class. Consequently, it may be argued that including them in the class violates their constitutional rights.

Other courts have held that there is no constitutional right to opt out of a subdivision (b)(2) class.[150] This view seems to be the better one. The Supreme Court held in *Hansberry v. Lee* that the constitutional due process rights of absent class members are satisfied if the interests of the individual class members were adequately represented in the class action.[151] The *Hansberry* decision, however, did not involve future class members, and therefore, is not directly on point. Nonetheless, subdivision (a) of rule 23 requires a finding of adequate representation as a precondition to certification of the class.[152] The significance of this requirement was explained in the recent Supreme Court decision *General Telephone Co. v. Falcon*.[153] The Court held that federal district

144. *Id.*

145. *Id.*

146. *See* FED. R. CIV. P. 23(c)(2). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974).

147. *See* FED. R. CIV. P. 23(c)(2). The Supreme Court, in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), expressed no opinion on whether the Constitution required notice and the right to opt out.

148. *See* 7A C. WRIGHT & A. MILLER, *supra* note 4, § 1786, at 149-50 (Supp. 1983), *and* cases cited therein.

149. *Id.*

150. *Id.*

151. Hansberry v. Lee, 311 U.S. 32 (1940).

152. *See supra* note 14 for the text of rule 23(a).

153. 457 U.S. 147 (1982).

courts must carefully consider the adequacy of representation question in each individual case.[154] It stated that the factors which must be considered when making this determination are (1) the qualifications of the named parties to represent the class; and (2) the competency and experience of the legal counsel representing the class.[155]

The adequacy of representation requirement functions as a procedural safeguard to the rights and interests of absent class members. As the Advisory Committee has recognized, class action adjudications under subdivision (b)(2) do not present the same dangers of prejudice to individual rights as do class actions certified under subdivision (b)(3).[156] Indeed, the provision in rule 23 requiring notice and the right to opt out in class actions certified under subdivision (b)(3) is a reflection of the Advisory Committee's fear that in those cases the interests of individual class members may differ significantly.[157]

Notice gives individual class members the ability to apprise the court of their various interests. In turn, the court can accurately determine whether the individual interests of members of the proposed class are sufficiently similar to justify maintenance of the action as a class action. The right to opt out of the class allows any individual class member who does not want his interests and rights concluded in the class proceeding to exclude himself from the class. With the notice and opt out requirements, the Advisory Committee felt that the court could make a more accurate evaluation of the adequacy of representation of unnamed class members' interests.[158]

In contrast to actions certified under subdivision (b)(3), an employment discrimination class action that seeks only injunctive relief gives the court little reason to fear inadequate representation because the class as a whole shares the common interest of being free from employment discrimination. Consequently, the Advisory Committee did not require notice in class actions certified under subdivision (b)(2).[159] Moreover, if the factors listed in

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154. In General Tel. Co. v. Falcon, 457 U.S. 147 (1982), the Supreme Court reversed the certification of a Title VII class action because the district court had failed to "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper representative under rule 23(a)." *Id.* at 160.

155. *Id.*

156. FED. R. CIV. P. 23(c)(2) advisory committee note, 39 F.R.D. 69, 104-05 (1966).

157. *Id.*

158. *Id.*

159. *Id.*

General Telephone Co. are carefully evaluated in each case,[160] the court can accurately determine whether the interests of future class members are adequately represented. Thus, the adequacy of representation requirement in rule 23 sufficiently protects the rights and interests of future employees included in the class. There is, therefore, no need for a constitutional requirement that notice be given to future employees in Title VII class actions, or that they be given a right to opt out of the class.

If future employees receive the benefit of a class action judgment, they should be included in the class and bound by the judgment. Failure to bind future employees results in the instability of class action judgments, and the same type of unfairness to the employer-defendant that the 1966 amendments to rule 23 were designed to prevent.[161] Prior to 1966, rule 23 allowed the court to decide the merits of a class action before deciding who would be included in the class.[162] Many courts allowed potential class members to intervene in the action once the liability of the defendant was established.[163] By waiting until the merits of the action were decided before including themselves in the class, potential class members could benefit from a favorable judgment without being bound by an unfavorable one.[164] To alleviate this problem, the Advisory Committee amended rule 23 to require the court to determine the scope of the class before reaching the merits, and to give preclusive effect to class action judgments.[165]

However, the same sort of unfairness to the defendant that the Advisory Committee meant to eliminate results if future employees are not bound by a Title VII class action judgment. Under Title VII, the court has an obligation to use its equity power to remedy past discrimination and eliminate similar discrimination in the future.[166] Consequently, the equitable remedies provided by the court in a class action suit will benefit future employees whether or not they are formally included in the class.[167] Moreover, if future employees are not included in the class, they will *not* be bound by an adverse judgment.[168] They, therefore, will not be

160. *See supra* text accompanying notes 152-54.
161. *Cf.* Rutherglen, *supra* note 4, at 75.
162. *See* FED. R. CIV. P. 23(c)(3) advisory committee note, 39 F.R.D. 69, 105-06 (1966).
163. *Id.*
164. *Id.*
165. *Id.*
166. International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977).
167. *See* Branham v. General Elec. Co., 63 F.R.D. 667 (M.D. Tenn. 1974); Harvey v. Stein Printing Co., 19 Fed. R. Serv. 2d (Callaghan) 1072 (N.D. Ga. 1973).
168. *See id.*

precluded from relitigating the claim adjudicated in the prior action. Such a result is manifestly unfair to the employer-defendant because the employer is bound by an unfavorable judgment, but unable to fully take advantage of a favorable one.

VI. CONCLUSION

Settlement of Title VII disputes prior to extensive discovery and trial allows victims of employment discrimination the ability to receive the remedial benefits of the Act sooner than if the case were fully litigated. Adjudicating Title VII rights in a class action consent decree, however, can unfairly prejudice the rights of future employees. Courts can avoid the potential unfairness of binding future employees in class action judgments by (1) limiting the claim extinguished in the class action to pre-judgment events; and (2) carefully scrutinizing the adequacy of the class representatives. Inasmuch as future employees receive the benefit of the injunctive relief provided by the class action consent decree, they likewise should be bound by the judgment.